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No. 02-1080

IN THE

Supreme Court of the United States

GENERAL DYNAMICS LAND SYSTEMS INC.,
Petitioner,

v.

DENNIS CLINE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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"[T]he very essence of age discrimination" is disparate treatment based on the false assumption that "productivity and competence decline with *old age*." *Hazen Paper Co. v Biggins*, 507 U.S. 604, 610 (1993) (emphasis added). The Age Discrimination in Employment Act ("ADEA") forbids such disparate treatment of employees 40 or older. ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1). Neither respondents nor the United States point to anything in the ADEA's language or structure, or in its policies or purposes, that justifies the counterintuitive conclusion that § 4(a)(1) should be extended to prohibit the disparate treatment of such employees based on their relative youth.

ARGUMENT

I. The ADEA's Text Prohibits Only Discrimination Based on Old Age.

1. There is no merit to the argument that the word "age" in § 4(a)(1) necessarily means "chronological age" – and cannot mean "old age" – and that § 4(a)(1) thus necessarily prohibits any disparate treatment based on the chronological age of employees 40 or older. "Old age" is (as demonstrated, *see* Pet. Br. 16-17), a natural meaning of the word "age." The mere fact that "chronological age" typically precedes "old age" or "advanced years" in dictionary definitions does not come close to justifying the conclusion that the "plain meaning" of § 4(a)(1) forbids disparate treatment of employees 40 or older on the ground that they are too young. Indeed, just as the language in § 4(a)(1) is best understood in context as prohibiting disparate treatment based on "old age," the term "age discrimination" – which, after all, is what the ADEA

prohibits – has consistently been understood by this Court as disparate treatment based on old age, not chronological age. *See Hazen Paper*, 507 U.S. at 610; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000).

The fact that the word "older" appears in § 4(f)(2)(B)(i) of the ADEA, but not in § 4(a)(1), is of no aid to respondents and the United States. *See* US Br. 12. The inclusion of the word "older" in the former provision – which was enacted two decades after § 4(a)(1) as part of the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 – does not establish the meaning of statutory language enacted two decades earlier.

Moreover, inclusion of the word "older" was necessary, in the words of OWBPA § 101, to clarify Congress's intention "to restore the original congressional intent . . . to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." That being so, § 4(f)(2)(B)(i) cuts in favor of reading the word age in § 4(a)(1) as meaning "old age" rather than "chronological age." *See* Pet. Br. 35-36. Congress, of course, had no comparable need to include the word "older" in § 4(a)(1) when the ADEA was enacted, as the presence of the very same term in the statutory findings and purposes made clear that Congress was prohibiting disparate treatment based on old age. ADEA § 2, 29 U.S.C. § 621 (noting problems "older workers" face "relative to the younger ages").[1]

[1] Respondents' plain meaning argument based on the term "discriminate" in § 4(a)(1) is insubstantial. *See* Resp. Br. 14-18. As respondents acknowledge, the Americans with Disabilities Act, contains a prohibition of "discrimination" that does not run in both directions. *See id.* at 20. The same is true here. Nor is respondents' reading dictated by the language in § 4(a)(1) protecting "any individual" from discrimination. That argument rests on a faulty analogy to Title VII. *See* Pet. Br. 15 n.1.

2. At a deeper level, the "plain meaning" argument advanced by respondents and the United States violates the "fundamental principle of statutory construction . . . that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). *See generally* John F. Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2456-70 (2003). Determining whether § 4(a)(1) authorizes disparate treatment claims by employees 40 or older based on their relative youth is not a matter of "definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). The question is whether such a reading "produces a *substantive effect* that is compatible with the rest of the law." *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (emphasis added). The reading of § 4(a)(1) advanced by respondents and the United States fails that test. Interpreted in the context of the ADEA as a whole, § 4(a)(1) can fairly be read *only* as a ban on disparate treatment based on old age.

First, the findings and purposes Congress expressly set forth in the ADEA itself focus exclusively on problems older workers face "relative to the younger ages." ADEA § 2, 29 U.S.C. § 621.[2] These congressional statements

[2] Congress found that "older workers find themselves disadvantaged in their efforts to retain employment," that "arbitrary age limits . . . may work to the disadvantage of older persons," and that "the incidence of unemployment . . . is, relative to the younger ages, high among older workers," and declared that the "purpose" of the ADEA

cannot be ignored on the ground that the "plain meaning" of § 4(a)(1) authorizes youth discrimination claims. Resp. Br. 12-13; US Br. 14-17. "[T]he meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). And the ADEA's findings and purposes provide the context that illuminates the meaning of § 4(a)(1). *See Toyota Motor Mfg. Kentucky, Inc. v. Williams*, 534 U.S. 184, 197-98 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 487 (1999). The problems Congress identified in the ADEA are problems older workers face because they are perceived as being too old, not because they turn 40 and are suddenly subject to adverse treatment because they are too young.

Second, respondents' interpretation is incompatible with Congress's decision to limit the protections of § 4(a)(1) to persons 40 and older. ADEA § 12(a), 29 U.S.C. § 631(a). It makes no sense to conclude that Congress forbade employers from ever considering chronological age in making employment decisions, but then limited the group that can assert this protection to those 40 and older. If arbitrary discrimination against the relatively young is a problem, those under 40 are far more likely to experience such discrimination than are those 40 and over. Yet, if respondents were correct, only the latter group could challenge it.

The United States nevertheless strains to reconcile its reading of § 4(a)(1) with the limitations imposed by § 12(a). According to the United States, Congress could reasonably

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included "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." ADEA § 2, 29 U.S.C. § 621.

have sought to protect only workers 40 and older from disparate treatment based on their relative youth because "workers who are under 40, as a class, do not face the same difficulties in the workplace, or the same difficulties in regaining employment, as workers who are at least 40." US Br. 17. But, as the United States acknowledges, workers 40 and older face increased difficulties because they are unfairly stereotyped as being too *old*. *That* is the harm against which the ADEA protects; it is not a broad prophylactic against subjecting workers 40 and older to any arbitrary adverse employment decisions because they would face greater difficulties as a result of age-based stereotypes were they to lose their jobs.[3] Indeed the logic of the United States' position would expand § 4(a)(1) to protect those 40 and older from disparate treatment for *any* reason, because their comparatively old age would make it more difficult to rebound. Thus, the attempt by the United States to reconcile its position with § 12(a) is a further reason to *reject* that position, not accept it.

At bottom, the conception of the ADEA advanced by respondents and the United States is untenable. Rather than interpreting § 4(a)(1) in a manner that addresses the concerns

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[3] The United States contends that "[f]or a 42-year-old employee who is fired because of his age and must seek new employment, it does not matter whether he was replaced by a 30-year-old or a 50-year-old." US Br. 14. But this assumes its own conclusion, *i.e.*, that the discharge alone is prohibited. A forty-two year old discharged for cause, or for no reason at all, must also seek new employment, and may also have difficulties being rehired, but the employee's discharge does not violate the ADEA. The forty-two year old is protected from being discharged on the ground that he is too old, and if he is discharged, he is protected from being denied a new job because he is an older worker.

identified by Congress in the ADEA itself, that rationalizes all of the Act's substantive provisions and limitations, and that allows for coherent and practical administration, respondents and the United States instead propose a sweeping expansion of the ADEA to cover conduct that Congress did not give the slightest indication of considering objectionable – much less so objectionable as to be made unlawful. They do so, in other words, despite the complete absence of any indication that Congress perceived a problem of discrimination favoring relatively older workers at the expense of relatively younger workers – or that employees face a particular risk of such disparate treatment once they turn 40.

Against this background, there is no reason to think Congress would have enacted a statute with the massively disruptive consequence of making all employment preferences for the comparatively older presumptively unlawful. To the contrary, a preference for older workers is often rational, and is in many ways socially beneficial. Indeed, the efforts on the part of respondents and the United States to show that their interpretation is consistent with the ADEA as a whole are unconvincing precisely because they are divorced from these realities. What respondents and the United States mean by "consistent" is that their reading of § 4(a)(1) can be shoehorned into the ADEA without creating any fatal contradictions with the Act's other provisions. That is a far cry from ascertaining the objective import of § 4(a)(1) by considering it in light of the ADEA as whole. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997).

Although the United States acknowledges (at least in part) that its proposed interpretation of § 4(a)(1) will cast a cloud over beneficial employment practices, its proposed

solution is wholly unsatisfactory. With respect to retiree health benefit plans such as the one offered here by General Dynamics Land Systems Inc. ("General Dynamics"), the United States tries to save such plans from illegality by invoking an affirmative defense (§ 4(f)(2)(B)(i)) that Congress added to the ADEA to serve quite different purposes. *See* Pet. Br. 35-36. But the incongruities produced by expanding § 4(a)(1) to "youth discrimination" claims do not end with retiree health plans. After all, § 4(f)(2)(B)(ii) of the ADEA allows employers to maintain voluntary early retirement incentive plans only when they are "consistent with the relevant purpose or purposes of this chapter." 29 U.S.C. § 623(f)(2)(B)(ii). If § 4(a)(1) forbids favoring older workers over younger workers, then no such plan could satisfy this statutory test unless it were offered to all employees 40 and older. The United States would presumably invoke § 4(*l*) of the Act to defend plans with a minimum eligibility requirement greater than 40, but that provision does not apply to all voluntary early retirement incentive plans, *see* 29 U.S.C. § 623(*l*) – and in any event, the United States would once again be redeeming its misguided interpretation of § 4(a)(1) by relying on a provision enacted to serve different ends. *See infra* pp. 10-11. That the United States is required to go to such lengths to preserve beneficial employment practices is powerful evidence that its basic conception of the ADEA is wrong: such practices should not be presumptively unlawful in the first place.

3. In view of the above, it is unsurprising that respondents and the United States fail in their effort to find support for their interpretation of § 4(a)(1) in the overall structure of the ADEA. The United States asserts that the "ADEA cannot function harmoniously" if General

Dynamics' reading of § 4(a)(1) is adopted. *See* US Br. 10-12. That contention, however, is merely a rhetorically overblown invocation of the canon that words are presumed to mean the same thing every time they appear in a statute. Specifically, the United States contends that "age" cannot mean "old age" in the ADEA's advertising and bona fide occupational qualification ("BFOQ") provisions, §§ 4(e), (f)(1), 29 U.S.C. §§ 623(e), (f)(1), and that it therefore should not be read to mean "old age" in § 4(a)(1).

That argument fails at every level. To begin with, the purported linguistic inconsistency of reading § 4(a)(1) as "old age" is exaggerated.[4] And, on the other hand, reading § 4(a)(1) as meaning "chronological age" most certainly results in linguistic inconsistency. The word "age" does not mean "chronological age" in § 2(b) of the Act, which identifies as one of the Act's purposes "help[ing] employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). There, Congress is referring to problems that arise as workers grow older – problems associated with "old age." The provision would be nonsensical if the word "age" were interpreted to mean "chronological age," because chronological age has no systematic "impact . . . on employment."

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[4] One could quite reasonably read "age" to mean "old age" in § 4(e). That provision contains a laundry list of prohibitions – "preference, limitation, specification, or discrimination," 29 U.S.C. § 623(e) – to indicate that it is unlawful in any way to advertise that an employer does not desire to hire older workers. Moreover, it is hardly "inexplicable" as the United States suggests (US Br. 10) that an employer could not advertise its preference for older workers but could have a policy of hiring older workers. The former is a "preference . . . based on age," 29 U.S.C. § 623(e), but the latter is not "discrimination . . . because of . . . age." *Id.* § 623(a)(1).

The canon that words are presumed to mean the same thing every time they appear in a statute thus does not support the United States here. *See Robinson*, 519 U.S. at 343. In all events, that canon is a "rule[] of thumb," not an unalterable command. *See generally Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996). Because "[i]t is not unusual for the same word to be used with different meanings in the same act," the presumption of uniformity "readily yields" when it is reasonable to conclude that the same word was "employed in different parts of the act with different intent." *Atlantic Cleaners & Dyers v. United* States, 286 U.S. 427, 432 (1932) (construing "restraint of trade or commerce" differently in two sections of Sherman Act); *accord United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212-14 (2001) (construing "wages paid" to mean two different things in the same amendment); *Robinson*, 519 U.S. at 341, 346 (construing "employee" to mean different things in different sections of Title VII); *Inyo County v. Paiute-Shoshone Indians*, 123 S. Ct. 1887, 1893-94 (2003).

The question before this Court is not what the word "age" means considered in isolation in § 4(a)(1) or anywhere else in the ADEA, but what the operative language in § 4(a)(1) barring discrimination "against any individual . . . because of such individual's age" means. As *Cleveland Indians* makes clear, that question is properly answered by contextual indicators of congressional meaning – here, the statutory findings and purposes, and the limitation of those protected to persons 40 and older – not by acontextual application of an interpretive canon. Thus, the canon on which the United States relies should "readily yield[]" to these substantive textual indicators that § 4(a)(1) bars only

discrimination based on old age. *See Atlantic Cleaners & Dyers*, 286 U.S. at 433.

Nor is the United States correct that the ADEA cannot "function coherently" as a substantive matter if § 4(a)(1) is interpreted to bar only disparate treatment based on old age. US Br. 9. To the contrary, there is no substantive incompatibility between § 4(a)(1) so read and the Act's advertising and BFOQ provisions. Section 4(e), which prohibits advertisements "indicating any preference, limitation, specification, or discrimination, based on age," 29 U.S.C. § 623(e), forbids employers from advertising a preference for younger workers – exactly what § 4(a)(1) prohibits. Section § 4(f), which allows employers to take any action "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business," 29 U.S.C. § 623(f), authorizes employers to do what § 4(a)(1) otherwise prohibits – *i.e.*, prefer younger workers over relatively older workers – when employers meet that provision's requirements. Neither provision is rendered superfluous or inoperative if § 4(a)(1) is read to bar only discrimination based on old age.

Finally, the United States draws an incorrect inference from the pension benefit plan provision, § 4(*l*), which Congress added to the ADEA in the OWBPA in 1989. *See* US Br. 13. The provision clarifies that employers do not violate the ADEA solely because they establish a "minimum age as a condition of eligibility for normal or early retirement benefits." ADEA § 4(*l*), 29 U.S.C. § 623(*l*).

The United States posits that the "most logical explanation" for § 4(*l*) is that it was necessary to exempt such plans from the general prohibition on favoring the older over the younger. US Br. 13. The real explanation for this

provision is different. At the time the OWBPA was enacted, some circuit authority held that "*every* retirement under an early retirement plan creates a prima facie case of age discrimination" by potentially coercing older workers into retiring before they are ready, and that "the employer must show both that the details of the plan have solid business justification and that each decision to retire is 'voluntary.'" *Henn v. National Geographic Soc'y*, 819 F.2d 824, 826 (7th Cir. 1987) (Easterbrook, J.) (criticizing *Paolillo v. Dresser Indus.*, 813 F.2d 583 (2d Cir. 1987)).[5] Subsection (*l*) clarified that minimum age requirements for early retirement benefits do not automatically subject employers to standard age discrimination claims. H.R. Rep. No. 101-664, at 38, 59 (1990). It was not added to insulate such benefits from challenges by those 40 or older but too young to qualify.

4. Respondents' analogy to Title VII does not help them. To be sure, Title VII – which prohibits discrimination against "any individual . . . because of such individual's race . . . [or] sex" – bars disparate treatment favoring as well as disfavoring persons of any race or either gender. But the text of Title VII differs from the ADEA in crucial respects that preclude drawing the analogy respondents seek to draw. Unlike the word "age" in § 4(a)(1) of the ADEA, which can mean either chronological age or old age, the words "sex" and "race" in Title VII cannot have the linguistic meaning of only one race or only one sex. Similarly, Title VII's protection of "any individual" necessarily insulates persons of all races and both genders from any type of disparate

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[5] The Second Circuit subsequently withdrew this opinion, but continued to hold that, absent proof of voluntary employee acceptance, an early retirement plan violated the ADEA. *Paolillo v. Dresser Indus., Inc.*, 821 F.2d 81, 84 (2d Cir. 1987).

treatment based on race or gender. The ADEA is not parallel in this respect. *See* Pet. Br. 15 n.1.

Thus, Title VII's text all but compelled the conclusion that the statutory prohibition covered the conduct in question in *McDonald* (disparate treatment of whites) and *Oncale* (same sex harassment). *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-79 (1976); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-79 (1998). The ADEA's text does not similarly compel the conclusion that employees 40 and older can challenge disparate treatment based on their relative youth. *McDonald* and *Oncale*, moreover, rest on the recognition that their holdings make unlawful precisely the kind of wrong Congress enacted Title VII to address. *McDonald*, 427 U.S. at 280; *Oncale*, 523 U.S. at 79. In stark contrast, the reading of § 4(a)(1) proposed by respondents and the United States would extend the ADEA to cover a concern that was (as respondents concede) foreign to the enacting Congress. *See* Resp. Br. 9-10.

It is thus very much to the point that Congress did not simply amend Title VII by adding the word "age," but instead enacted an entirely separate statute. Indeed, when Title VII was enacted, Congress rejected proposals that would have banned discrimination based on age, and instructed the Secretary of Labor to study age discrimination. *Report of the Secretary of Labor, The Older American Worker: Age Discrimination in Employment*, at 1 (1965). The ensuing report, which was the foundation for the ADEA, concluded that discrimination based on age "means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving – for example – race." *Id.* at 2.

The Court has thus recognized the "significant differences" between Title VII and the ADEA, and has repeatedly rejected arguments that the ADEA should be construed identically to Title VII. *Lorillard v. Pons*, 434 U.S. 575, 584-85 (1978); *EEOC v. Arabian Am. Oil Co*, 499 U.S. 244, 256 (1991). Indeed, this Court has refrained from adopting in ADEA cases the disparate impact theory and Title VII's burden-shifting model. *See Hazen Paper*, 507 U.S. at 610; *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996). The analogy to Title VII is therefore inapt.[6]

II. The United States' Invocation of the ADEA's Legislative History Fails.

In the vast legislative history of the ADEA, the sole support the United States can muster for the proposition that § 4(a)(1) authorizes youth discrimination claims is a brief, ambiguous colloquy between Senators Yarborough and Javits. US Br. 18-19. But "[t]he remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). There is no reason to believe that other Members of Congress heard the colloquy, much less that it

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[6] Respondents' "snapshot" argument is a red herring. The interpretation of § 4(a)(1) they advance would make any age differential presumptively unlawful whether it operated as a snapshot or as a so-called "age-based 'attainment' goal." Resp. Br. 8, 17. Respondents also ignore the inherent fairness of the collective bargaining agreement in this case, which provides retirement health benefits to the oldest employees who, given their relatively advanced age, would have less time to recover from and adjust to the change in benefits. *See* Pet. Br. 42.

influenced their votes. *See United States v. O'Brien*, 391 U.S. 367, 384-85 (1968).

To the extent the Court looks beyond the statutory text (and it need not do so), the committee reports are a far more reliable guide to the meaning of the ADEA. *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Zuber v. Allen*, 396 U.S. 168, 186-87 (1969). Not a word in those reports suggests that Congress intended to authorize ADEA suits by employees who claim they were treated unfairly because of their relative youth. H.R. Rep. No. 90-805 (1967); S. Rep. No. 90-723 (1967).

III. The Judgment Below Cannot Be Defended on the Basis of the EEOC's Interpretive Guideline.

Not until the end of its brief does the United States invoke the interpretive guideline of the Equal Employment Opportunity Commission ("EEOC") as a ground for reading age in § 4(a)(1) as meaning "chronological age." US Br. 26-29 (citing 29 C.F.R. § 1625.2). Even then, the United States makes only a sheepish plea for deference to the guideline. That is doubtless because deference is insupportable, and the guideline provides no basis for affirming the Sixth Circuit.

1. As an initial matter, it is ironic that the United States invokes the EEOC guideline, as the guideline would appear to protect General Dynamics' plan, not condemn it. Subpart (b) recognizes the legality, under particular conditions, of extending "additional benefits . . . . to older employees within the protected group," 29 C.F.R. § 1625.2(b). General Dynamics' plan meets those conditions. It (1) offers "additional" benefits "over and above" those provided to younger workers (*see* Resp. Br. 25); (2) "will counteract problems related to age

discrimination" (29 C.F.R. § 1625.2) because, as respondents concede, "an employer's oldest workers generally have fewer working years to recover from changes in their benefits" (Resp. Br. 25) and (3) is "not . . . used as a means to accomplish practices otherwise prohibited by the Act," 29 C.F.R. § 1625.2, because the plan does not disfavor workers because they are too old.[7]

Indeed, the EEOC and its predecessor the Department of Labor ("DOL") have routinely rejected claims (indistinguishable from those here) that § 4(a)(1) prohibits disparate treatment based on employees' relative youth. *Isabella v. Runyon*, No. 01944083, 1995 WL 653513, at *1 (E.E.O.C. Oct. 19, 1995) (retirement date); *see also DuPriest v. Bentsen*, No. 01942145, 1994 WL 1755951, at *2 (E.E.O.C. May 2, 1994) (retirement plan); *Burt v. Bentsen*, No. 01942163, 1994 WL 735377, at *2 (E.E.O.C. Apr. 29, 1994) (same). These opinions – far from being mere "statements" that were justified by § 4(*l*)(1)(A) (*see* US Br. 27 n.5) – unambiguously concluded that complaining parties, over 40, had "fail[ed] to state a claim under the ADEA, because . . . the ADEA protects persons who are treated differently than persons who are *younger*." *Isabella*, 1995 WL 653513, at *1 (emphasis added); *see DuPriest*, 1994 WL 1755951, at *2; *Burt*, 1994 WL 735377, at *2.[8] Similarly,

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[7] The United States tries to brush off subpart (b), contending it is "not at issue here." *See* US Br. 27 n.4. But the meaning of subpart (a) is inherently intertwined with the meaning of subpart (b).

[8] Although the United States asserts without citation that these decisions are not precedential, US Br. 27-28 n.5, they were signed by the officer authorized to issue "final" decisions "on behalf of the Commission." 29 C.F.R. §§ 1614.405, 1614.407 (1994); 29 C.F.R. §§ 1614.405, 1614.407 (1995).

DOL has approved a variety of practices, including excusing employees 55 and over from physically demanding tasks, Letter WH-389, 1976 WL 41742 (June 25, 1976), and "evening shifts and holidays," Letter WH-419, 1977 WL 53487 (July 1, 1977),[9] on the ground that "[t]he purpose of the ADEA is to protect the older worker from employment practices that discriminate against him in favor of younger workers." *E.g.*, Letter WH-419, 1977 WL 53487.[10]

2. Putting these incongruities and inconsistencies to the side, and reading the EEOC guideline as endorsing claims of disparate treatment based on relative youth, the guideline is unlawful. "Even contemporaneous and longstanding agency interpretations [which § 1625.2 obviously is not] must fall to the extent they conflict with statutory language." *Public Employees Ret. Sys. of Ohio v. Betts*, 492 U.S. 158, 171 (1989). Whether such a conflict exists is determined by the language of the statute as a whole and by employing all the "traditional tools of statutory construction." *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, at 843 & n.9 (1997); *Brown*, 513 U.S. at 117-22. The United States cannot manufacture the statutory ambiguity necessary to justify *Chevron* deference in this case merely by pointing to the fact that the word

[9] *See also* Letter WH-404, 1976 WL 41753 (Aug. 26, 1976); Leter WH-451, 1978 WL 51448 (Jan. 31, 1978).

[10] Although the United States asserts without citation that the guideline was never amended to reflect these DOL opinion letters, *see* US Br. 27-28 n.5, the EEOC explained when it announced its guideline in 1981 that "[t]he Commission intends that the final interpretation contained in paragraph (b) of this section provide [sic] for a continuation of the flexible approach first announced in administrative Opinion Letters of the Department of Labor." 46 Fed. Reg. 47724 (Sept. 29, 1981) (referring to WH-404, Aug. 26, 1976, and WH-451, Jan. 13, 1978).

"age" in § 4(a)(1) can (considered in isolation) mean either chronological or old age. "Ambiguity is a creature not of definitional possibilities but of statutory context." *Brown*, 513 U.S. at 118; *Deal*, 508 U.S. at 131-32. Thus, as demonstrated, employing the traditional tools of statutory construction to ascertain § 4(a)(1)'s meaning, the EEOC is foreclosed from expanding § 4(a)(1) to reach youth discrimination claims.

3. While the foregoing meets the United States on its own ground, the EEOC's guideline is not in fact entitled to *Chevron* deference because it was never intended to be the kind of substantive action that has the force of law. The EEOC promulgated the guideline as an "interpretation" rather than as a "substantive regulation." *Compare* 29 C.F.R. § 1625 Subpart A *with* 29 C.F.R. § 1625 Subpart B. That was no accident. In 1968, when DOL originally promulgated the predecessor guideline, it stated that the guideline was intended merely to provide "a practical guide to employers and employees" as to how DOL viewed its enforcement authority. 29 C.F.R. §§ 860.1, 860.91 (1969). To be sure, when the EEOC repromulgated the guideline in 1981 it did so after notice and comment, but only "to comply with the spirit" of a Carter Administration Executive Order requiring comment on *all* proposed regulations. 43 Fed. Reg. 12661 (Mar. 23, 1979). Critically, the EEOC did not comply with the 30-day notice period required for substantive rules, 46 Fed. Reg. 47724; *see also* 5 U.S.C. § 553(d), and deliberately chose to maintain the guideline as a nonbinding interpretation. *See* 46 Fed. Reg. 47724.[11] As such, the guideline is not entitled to *Chevron* deference.

[11] The same EEOC "Interpretations" endorse a "disparate impact" theory of ADEA liability. *See* 29 C.F.R. § 1625.7.

Christensen v. Harris County, 529 U.S. 576, 587 (2000); *United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001).

It is, of course, perfectly plain that the guideline does not warrant any deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Neither respondents nor the United States have resolved the obvious contradictions between subparts (a) and (b) of § 1625.2 that would exist if the guideline were read as they propose. *See* Pet. Br. 38-39. Moreover, their interpretation can hardly be said to be a consistent or longstanding one. Over the 35 years since Congress enacted the ADEA, the DOL and then the EEOC have *never* sought to enforce judicially a claim of discrimination based on relative youth, and have upheld such a claim in only one administrative enforcement proceeding. *Garrett v. Runyon*, No. 01960422, 1997 WL 574739 (E.E.O.C. Sept. 5, 1997), *aff'd sub nom. as modified, Garrett v. Henderson*, No. 01960422, 1999 WL 909980 (E.E.O.C. Sept. 30, 1999).[12] And, as demonstrated *supra*, they have routinely rejected claims of disparate treatment by workers 40 and older based on their relative youth. Thus, this Court should give the EEOC guideline no weight whatsoever in deciding the present case.

IV. The Interpretation Advanced By Respondents and the United States Would Inflict Serious Real-World Harms.

Respondents and the United States utterly fail to come to grips with the severe practical harms their

[12] The United States points to two earlier DOL opinion letters supporting its reading, but DOL explicitly revoked both. *See* Letter WH-389, 1976 WL 41742 (June 25, 1976) (revoking Opinion Letters WH-30 (May 1, 1970) and WH-36 (May 25, 1970)).

interpretation of § 4(a)(1) would inflict. Ubiquitous and uncontroversial employment practices would be rendered flatly unlawful or would be placed at risk of being found unlawful. Employers thus would find themselves in a "40 and older" straightjacket, forced to extend favorable treatment equally to all employees in that group or to none. The obvious, and perverse, consequence of adopting such a rule is certain to be that employers will decline to offer benefits or other favorable consideration to anyone 40 or older, rather than risk ADEA liability by extending favorable treatment to only some. That is why not only groups representing employers but also those representing workers have urged this Court to reject the view espoused by respondents and the United States.

Despite the soothing assurances offered by the United States, the view it advocates would throw into question beneficial employee benefit plans designed to protect the oldest of workers. *See* US Br. 22-23. At the very least, it would subject any employer offering such a plan to the risk of vexatious and costly litigation. That prospect – even if any such litigation ultimately would be baseless – would create uncertainty with respect to current plans and no doubt would deter employers from offering such plans in the future.

To go beyond this particular case for a moment – and beyond its benefit plan context – authorizing disparate treatment claims based on relative youth would make illegal – without any possibility of a statutory affirmative defense – efforts on the part of employers to accommodate the needs of relatively older workers. It would become unlawful to engage in practices expressly approved by DOL, such as allowing only the oldest workers to opt out of operating

heavy machinery, Letter WH-389, 1976 WL 41742 (June 25, 1976), or to decline to work night shifts. Letter WH-419, 1977 WL 53487 (July 1, 1977). It also would mean that an employer could not relax eligibility or performance standards for its oldest workers, because to do so would discriminate against those too young to qualify for the relaxed standard. For example, it would make illegal the sliding scale system used by the Marshals Service, under which "older deputies can earn points for lower levels of fitness than younger ones." *Koger v. Reno*, 98 F.3d 631, 634 (D.C. Cir. 1996). Such a practice would not fall within the BFOQ defense, because being less fit is the opposite of a bona fide occupational qualification. It hardly makes sense to interpret the ADEA as forbidding employers from making such accommodations to keep older workers in the workforce. Yet that is precisely what respondents and the United States propose to do.

Expanding § 4(a)(1) as respondents and the United States advocate would thus overturn 35 years of settled judicial doctrine, on which employers have relied in running their businesses and structuring their employment decisions. As General Dynamics pointed out in its opening brief, employers would be put at risk of liability whenever an employment action disproportionately impacted some identifiable cohort of those 40 or older, and would be certain to face a flood of new litigation testing the limits of the massive expansion of the ADEA respondents and the United States propose. Pet. Br. 44-45. Neither respondents nor the United States even try to answer those objections.

CONCLUSION

The decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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